

FARAD CONTINUATION SHEET NO.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5706 OF 2005

 Office notes, office :
 Memoranda of Coram, :
 appearances, Court's : Court's or Judge's Orders
 orders or directions :
 & Registrar's orders. :

Mr. U.E. Mooman with S. B.
 Sharma for petitioner

Mr. Atul Vanarse, AGP for R-2
CORAM: SMT. RANJANA DESAI, J.
 8/9/2005

P.C.:-

The petitioner has filed S. C.
 Suit No. 456/97 against respondents 1
 and 2, in the City Civil Court at
 Mumbai for declaration and perpetual
 injunction.

2. Shortly stated the case of the
 petitioner is that the petitioner and
 respondent 1 are joint owners of the
 suit premises. The plot of land on
 which the suit premises are situate
 belongs to the Collector. According
 to the petitioner the rent receipts of
 the suit structure stand in the joint
 names of the petitioner and respondent

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3. In or about 20/1/97 the petitioner came to know that respondent 1 was intending to assign, transfer and create third party interest in the suit premises. The petitioner requested respondent 1 not to do so. Respondent 1 told him that nobody can prevent him from disposing of the suit premises. It is therefore, that the petitioner had to file the instant suit. It is the petitioner's case that respondent 1 has under a fabricated document sold the suit premises to respondent 3.

4. It appears that respondent 3 has filed suit against the son, daughter-in-law and another brother of the petitioner being L.E. Suit No. 34/98 in the Small Causes Court at Mumbai and on 6//12/99 an ex parte decree of eviction was passed. In that suit the petitioner was not made a party. I am informed that warrant of possession has been executed and the petitioner and his family has been

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dispossessed. In the circumstances in S C Suit No. 456/ 97, the petitioner took out a chamber summons for amendment of the plaint.

5. It appears that the petitioner wants to introduce the above subsequent events in the plaint and wants to challenge the ex parte decree passed in L E Suit No. 34/98 as having been vitiated by fraud. The said chamber summons was dismissed by the impugned order and hence this writ petition.

6. I have heard the learned counsel appearing for the petitioner at some length. The learned counsel for respondents 2 and 3 are present. As directed by me the petitioner's counsel has served notice on respondent 1. He has sent a telegram to respondent 1 at his address at Sultanpur, U.P. He has also sent a notice by Registered A.D. and an affidavit of service has been filed by A. Pandey constituted attorney of the petitioner. The said affidavit of

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service along with the annexures are taken on record. Despite service none is representing respondent 1.

7. The learned counsel for the petitioner contended that the trial court was wrong in dismissing the chamber summons by observing that if the petitioner wants to take up any plea adverse to the validity of the execution, the suit is not the remedy under section 47 of the CPC. Drawing my attention to Section 47 of the code the learned counsel urged that since he was not party to the L.E. Suit No. 34/98 Section 47 will not apply at all. He submitted that by amendment the petitioner wants to only introduce subsequent events and he does not want to change the cause of action. In the circumstances, the trial court erred in dismissing the chamber summons.

8. I find substance in the submission of the learned counsel. It is well settled that amendment application which prevents multiplicity of proceedings, must be

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allowed. Besides whether the petitioner can proceed under section 47 of the CPC and, therefore, suit is not the remedy can always be decided at the trial. If found proper, after hearing parties, it can be made the subject matter of an issue. No prejudice would be caused to the other side. Moreover I am informed that the trial has not started. I do not feel that by this amendment the petitioner is trying to introduce any facts which change the texture of the suit.

9. Hence impugned order dated 4/8/05 is set aside. Amendment is allowed. Needless to say that after the amendment is carried out the defendants can always file additional written statement. Amendment to be carried out within six weeks. This court has not expressed any opinion on the merits of the case.

10. Petition disposed of.